

**Editor's note:** Appealed – dismissed, Civ.No. 79-455C (D.N.M. Feb. 11, 1980), dismissed No. 80-1291 (10th Cir. March 29, 1982), 673 F.2d 1165, cert denied 459 U.S. 969, 103 S.Ct. 297 (Nov. 1, 1982), rehearing denied 459 U.S. 1229 (Feb. 22, 1983)

FRANK LUJAN

IBLA 76-393

Decided April 5, 1979

Recommended decision by Administrative Law Judge John R. Rampton, Jr., following a hearing on the location of a certain quarter section corner reestablished during a dependent resurvey.

Recommendation accepted; BLM decision affirmed.

1. Surveys of Public Lands: Dependent Resurveys

Where, at a hearing, a protestant does not meet his burden of establishing by clear and convincing evidence that a dependent resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing his protest against the survey will be affirmed.

APPEARANCES: M. L. Amijo, Jr., Esq., Las Vegas, New Mexico, for protestant; Elliot L. Weinreb, Esq., Santa Fe, New Mexico, for intervenor; Gayle E. Manges, Esq., Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the respondent.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On June 2, 1970, the State Director for New Mexico, Bureau of Land Management (BLM), directed a dependent resurvey of the boundaries of sec. 18, 19, 20, 21, 29, 30, and 31, T. 17 N., R. 24 E., New Mexico principal meridian. The Special Instructions provided for the necessary examination, retracements, and restoration of points of control consistent with the U.S. Department of the Interior, Manual of Instructions for the Survey of the Public Lands of the United States, § 400 (1947) (hereinafter cited as "Manual"). <sup>1/</sup> The township had originally been surveyed by Holden R. Warner in 1880. The dependent resurvey in issue was made between June 15 and August 13, 1970, by Duane E. Olsen, supervisory cadastral surveyor for BLM.

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<sup>1/</sup> The Manual of Instructions for the Survey of the Public Lands of the United States was reissued in 1973, in a slightly different format.

It appears from the record that no evidence of the original corner common to sections 7, 8, 17, and 18 could be found so the corner was reestablished by the proportionate distance method. Manual, §§ 367-371. To reestablish this section corner, it was necessary to utilize four known corners, one in each of the four cardinal directions from the corner to be reestablished. Accordingly, Olsen utilized what he had identified as the quarter corner common to sections 8 and 17 (also described as the north quarter corner for section 17), for his east control point. Olsen buried the stone which he considered to be the original quarter corner monument and replaced it with a new brass-capped iron post, suitably marked.

Frank Lujan, protestant herein, disputes the recovered site of the quarter corner for sections 8 and 17 as being many hundred feet south and several hundred feet east of the locally accepted location of this quarter corner. The Director, BLM, dismissed the protest. Lujan then appealed to this Board, citing three general grounds in his appeal. In Frank Lujan, 30 IBLA 95 (1977), we found that BLM had authority to order the dependent resurvey and that the retracing of the line establishing the boundary between sections 8 and 17 was a legally valid part of the dependent resurvey given the assumed fact that the Federal Government no longer owns any land on either side of the said section line. <sup>2/</sup> However, we found that the record as then constituted justified granting of a hearing to allow protestant an opportunity to prove his allegation that the quarter corner was not reestablished at its original location. Accordingly, we referred the case for hearing before an administrative law judge. Our opinion set forth the issue to be resolved at hearing and the appropriate burden of proof:

Appellant, in challenging the Government resurvey, has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. 30 IBLA, at 101.

On August 9, 1977, Michael E. Martinez requested, through counsel, that he be permitted to intervene on the ground that he is an adjacent property owner whose rights would be affected by any change in the disputed boundary. There was no objection to the motion and the request was granted on August 22, 1977.

The hearing was held at Las Vegas, New Mexico, November 30 and December 1, 1977, before Administrative Law Judge John R. Rampton, Jr.

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<sup>2/</sup> It appears from the Master Title Plat for T. 17 N., R. 24 E., New Mexico principal meridian, that the NW 1/4 NW 1/4 sec. 17, abutting on the section line between sections 8 and 17 is public land of the United States.

At the hearing, each represented by counsel, were Frank Lujan, protestant; Bureau of Land Management, respondent; and Michael E. Martinez, intervenor. Following the receipt of the recommended decision by Judge Rampton, counsel for Lujan moved the Board to review the entire record de novo before making any findings of fact or conclusions of law. Counsel for Martinez requested the Board to adopt the recommended decision. Counsel for BLM did not respond.

The Secretary of the Interior has the duty to determine what lands are public lands and to extend or correct the surveys of public lands, including the making of resurveys which he deems necessary to properly mark the boundaries of the public lands remaining unsold, provided no such resurvey shall be executed so as to impair the bona fide rights of any owner of lands affected by such resurvey. 43 U.S.C. §§ 2, 752, 772 (1976). See Kirwan v. Murphy, 189 U.S. 35 (1903); Stanley A. Phillips, 31 IBLA 342 (1977); Stanley G. West, 14 IBLA 26 (1973). BLM has exclusive jurisdiction over all matters pertaining to surveys and resurveys affecting public lands. Where private owners of title to land which has passed out of the United States are in dispute over land boundaries, local courts of competent jurisdiction will make the final determination. Phillips, supra.

Surveys of public lands by the United States, after acceptance, are presumed to be correct and will not be disturbed except upon clear proof that they are fraudulent or grossly erroneous. Where a protestant challenges the validity of a dependent resurvey he must establish by clear and convincing evidence that the resurvey is not an accurate retracement of the lines and reestablishment of the corners of the original survey in order to sustain his position. Nina R. B. Levinson, 1 IBLA 252, 78 I.D. 30 (1971).

Where a Government survey has been challenged by a protestant, he has the burden of establishing that the survey is erroneous and of identifying specifically reversible error in the decision appealed from. An appellant cannot expect the Department to assume his burden of searching the record and the law in an effort to find some reversible error in the decision appealed from. Mrs. J. W. Moore, 8 IBLA 261 (1972).

When locations of corners established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. United States v. Heyser, 75 I.D. 14 (1968); Rubicon Properties, Inc., A-30748 (May 6, 1968).

In determining whether original survey corners were properly reestablished by an official dependent resurvey of public lands, the fact that the measured distance and bearing between two section corners as determined by the resurvey differs somewhat from the

measurement and bearing given in the original survey is not sufficient alone to disprove the reestablishment of the corner, as discrepancies between measurements and bearings in old and more recent surveys are not uncommon. Alfred Steinhauer, 1 IBLA 167 (1970); Rubicon Properties, Inc., *supra*.

A protest by private parties against acceptance of a plat of a dependent resurvey of an area of public land is properly dismissed where the evidence supports a determination that an original quarter section corner in dispute was actually found by Government surveyors rather than by a private surveyor, contrary to the protestant's contentions. Rubicon Properties, Inc., *supra*.

It is not the Government's burden to establish that a resurvey is correct; rather it is appellant's burden to show that the resurvey is incorrect. Joyce Livestock Co., 2 IBLA 322 (1971); Porter Estate, A-30817 (December 2, 1968); James L. Knight, A-27374 (September 19, 1956). It is appellant's obligation, not that of this Board, to identify specifically reversible error in a dependent resurvey. United States v. Cascade Calcium Products, Inc., A-31187 (November 4, 1969).

In applying the above legal principles, we do not find a basis for disturbing the resurvey here. As mentioned above, the disputed quarter corner was not reestablished directly as part of the dependent survey, but rather as a control point to reestablish the section corner common to sections 7, 8, 17, and 18, at the northwest corner of section 17. Olsen testified that in order to locate the section corner by the proportionate distance method, he required known points in each of the four cardinal directions from the missing corner. Olsen testified that the first monument to the east of the missing section corner is the quarter corner common to sections 8 and 17, the location of which is the subject of this dispute.

Olsen described the technique used to find the disputed corner. The location of the northwest corner of section 17 was estimated by comparison with established corners to the north, south, and west. A random line was then projected eastward with the expectation that an established corner could be found to the east somewhere near the random line. A search was made in the vicinity of where the quarter corner could be expected to be found. To assist in the search, Olsen's crew had the Warner field notes which described the location of the original corner. The notes called for agricultural land east of the Canadian (Red) River which flows through sections 8 and 17. The notes also called for houses to be found on the east side of the river, both north and south of the quarter corner.

In addition, local residents were importuned to assist in finding the quarter corner monument. An unidentified person irrigating on Lujan's land volunteered information that the sought-for corner monument was "up the slope from a small wooden bridge over an irrigation canal" (Tr. 336).

The monument found was described by Olsen in his field notes as a "basalt stone, 12x6x4 ins., set firmly in a mound of stone, with apparent, but illegible marks on the N. face" (Govt. Exh. 6, p. 16). This "original corner stone" was buried alongside a new iron monument erected at the spot. (The rock in question was not recovered as evidence for the hearing although there was a dispute as to its size, markings, and type of material.)

Olsen testified that the location corresponded to the original Warner field notes although some of the buildings described by Warner were no longer standing.

Protestant contends that the monument identified as the north quarter corner section 17 is not the original monument established by Warner in 1880. Rather, protestant asserts that the original monumentation was lost or obliterated and that the quarter corner should be reestablished by other methods. The following arguments were advanced in support of his position:

First, the physical description of the monument as reflected in notes of the dependent resurvey differs from that of the Warner notes. Warner described the corner stone as: "Set malpais rock 16x14x12 in mound of rock marked 1/4 on N side for 1/4 sec. cor." (App. Exh. E). The handwritten notes made by Olsen's assistant, Conrad Romero, described the monument as: "A sandstone 12"x6"x4", well set in a mound of stone marked 1/4 on N. face" (App. Exh. A). The final typed field notes contain the following description: "[A] basalt stone, 12x6x4 ins., set firmly in a mound of stone; with apparent, but illegible marks on the N. face" (Govt. Exh. 6, p. 16).

Considering the type of stone, we attach no significance to the apparent discrepancy in the type of stone mentioned in each account. The word "malpais" is apparently not a technical term for a rock type, but rather a general term applied indiscriminately to any volcanic-type rock. The sandstone/basalt discrepancy between the two modern notes appears to reflect a difference of opinion of two nonexperts in geology. Further, the Government introduced two rocks - one sandstone, one volcanic tuff - displaying similar characteristics which could easily have been characterized as "malpais" as that term was likely used by Warner.

Similarly, the discrepancy in the identification of the marking is insignificant. Olsen explained that final typed notes reflected an abundance of caution in reading markings on badly weathered stone. The initial identification by Romero corroborates a finding that the stone is, in fact, the Warner monument. Olsen's subsequent cautionary measure does not add to nor subtract from any conclusion that may be drawn because a stone of that suspected age may be expected to have become worn to the point where identification of its markings would be difficult.

Although there is a fairly significant disparity in the purported size of the Warner monument and the monument identified by Olsen in his resurvey, Olsen gave plausible explanation for that disparity. When asked by counsel for the intervenor if he had seen that amount of discrepancy in other monuments Olsen replied:

Yes. In fact, it's the rule instead of an exception. They hardly ever did – could you measure a stone and come up with the same dimensions as the surveyor records. I understand they had a certain standard they had to meet. The rock had to be a certain size; and the one time I found a quarter-corner, it was no bigger than my hand, but it was marked "one-quarter (1/4)". It was out in the plains, there wasn't many rocks around. I guess that's why he picked a little rock, but it was in good relationship with other corners, and it was marked "one-quarter (1/4)", and of course, the record calls for a big stone, probably the minimum size. In going over record field notes in resurvey field notes, I think that I would say it's common practice that you couldn't always come up with the same size. (Tr. 400).

Accordingly, although the difference in size raises doubts as to the identity of the monument, it is not determinative of the issue.

In addition to the identification of the monument, protestant takes issue with the reliability of its location. Protestant alleges that the current position of the quarter corner does not correspond to the calls of the Warner field notes. John C. Drissel, a professional surveyor, testified that the following discrepancies existed:

From the northwest corner of 17, which they [Olsen] claim to have reestablished, they went 23.63 chains, where the original surveyor [Warner] only went 18 chains, and this is a natural monument which can be identified.

JUDGE RAMPTON: What is the natural monument?

DRISSEL: The foot of the west mesa.

(Tr. 51-52).

This is 5.6 chains greater, which means he could not have been on the right line or going in the right direction. He had to go on a diagonal to get 5 more chains to the foot of the west mesa.

(Tr. 50).

These discrepancies are explained in the record. The first discrepancy may be easily explained by noting that the northwest corner of section 17 may not have been relocated at the identical point

as the Warner survey because the section corner had been reestablished by the double proportionate method. In addition, the foot of the bluff is not a precise point, but rather is an irregular line. Accordingly, the described distances may easily be in disagreement without affecting the location of the disputed quarter corner. The discrepancy in houses may be explained simply by their obliteration and subsequent cultivation of fields in previous locations.

Moreover, the Government has shown significant similarities between present conditions and those described by Warner, which indicates that the quarter corner has been properly reestablished. Olsen related that Warner called for agricultural land to be located between the quarter corner and the Canadian River. If the monument were located as protestant urges, the monument could not meet the Warner topographic calls between the quarter corner and the northeast corner of section 17. In the location reestablished by Olsen, the slope is rather constant over the distance to the northeast corner, explaining the lack of separate topographic call by Warner (Tr. 359 and Govt. Exhs. 11, 13, 14, and 15).

In an attempt to explain the existence of the stone identified as the disputed corner, protestant urges that it may have been a turning point in the Gervacio Nolan Grant Survey of 1898, which has since been rejected (Appellant's Exh. C). There is nothing to indicate that such turning points were, in fact, monumented in a similar manner to the recovered stone. Neither is the turning point established with sufficient certainty to compare with other established corners in the vicinity. Without such additional proof, protestant's assertion is little more than speculation, and we do not attach much weight to the argument.

Protestant argues that the change in field notes from the handwritten form to the typed form affects the validity of the survey. The Bureau of Land Management prepares and approves the final typed field notes and accepts the plat as the only official and legally binding document of any survey or resurvey executed by them. Only the final typed field notes are signed and certified by the surveyor as the field notes representing field work executed by them. Observations noted in the field tablets may be those of subordinates less experienced and skilled than the surveyor in charge. It is the responsibility of the surveyor to see that no errors or misjudgments noted in the field tablets get transferred to the legally binding, final typed field notes. The protestant has not produced any evidence refuting the information shown in the Government resurvey.

Protestant next argues that the dependent resurvey should be overturned because of noncompliance with section 354 of the Manual, in that the disputed quarter corner was not tied in with the northeast corner of section 17. The section provides in pertinent part:

354. In case of material disagreement between the particular evidence in question and the record calls, the process of elimination of those features regarding which there may be doubt, after making due allowance for natural changes, will serve a most useful purpose, as follows:

- (a) The character and dimensions of the monument in evidence should not be widely different from the record;
- (b) The markings in evidence should not be inconsistent with the record; and,
- (c) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

A certain measure of allowance for ordinary discrepancies should enter into the consideration of the evidence of a monument and its accessories, and no definite rule can be laid down as to what shall be sufficient evidence in such cases. Much must be left to the skill, fidelity, and good judgment of the engineer in the performance of his work, ever bearing in mind the relation of one monument to another, and the relation of all to the recorded natural objects and items of topography.

No decision should be made in regard to the restoration of a corner until every means has been exercised that might aid in identifying its true original position. \* \* \* A line will not be regarded as doubtful if the retracement affords the recovery of acceptable evidence.

Based on Olsen's several years of resurvey experience in New Mexico and his considerable knowledge of the subject township acquired during the subject resurvey, it was his considered professional judgment that the monument recovered was, in fact, the original quarter corner of sections 8 and 17, and that no further surveys were necessary.

The testimony of protestant's surveyors highlighted little more than what was alleged in the initial appeal to this Board. Their opinions seemed to be based more on the inadequacies of the dependent resurvey and the apparent distortion of the north section line of section 17 by the reestablishment of the north quarter corner, rather than upon an affirmative showing that the location is in fact wrong. Testimony at the hearing as well as visual inspection of Government's Exhibit 11 and Appellant's Exhibit 1 indicate similar distortions are not uncommon in this type of terrain and with original surveys of the Warner era.



[1] In summation, we find that, at most, protestant has raised doubts as to the proper identification of the monument in question. Nevertheless, as we directed in the order for the hearing, protestant "has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey." (Emphasis supplied.) 30 IBLA at 101. We find the protestant has fallen short of this standard. The weight of the evidence supports our upholding the dependent resurvey.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, BLM, is affirmed.

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Douglas E. Henriques  
Administrative Judge

We concur.

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Joan B. Thompson  
Administrative Judge

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James L. Burski  
Administrative Judge

